No. 85-1804

In The
Supreme Court of the United States
October Term, 1985

THOMAS WEST,
Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals for the Third Circuit correctly affirm the District Court's dismissal of Petitioner's hybrid breach of contract/breach of duty of fair representation action based upon Petitioner's failure to satisfy the requirements of the applicable statute of limitations, 29 *U.S.C.* § 160(b)?

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Counter-Statement of the Case

The pertinent facts with respect to the issue before this Court were never in dispute. Petitioner Thomas West was dismissed from service with Respondent Consolidated Rail Corporation ("Conrail") on November 27, 1981, for alleged possession of alcoholic beverages (Pa16).* On February 9, 1984, Conrail reinstated Petitioner by reducing his dismissal to a suspension without back pay (Pa16).

* "Pa" refers to the Appendix attached to the Petition for a Writ of Certiorari.

He subsequently transferred to and has since been working for Respondent New Jersey Transit Corporation, created by the New Jersey Legislature to provide public transit service. *N.J.S.A.* 27:25-1 *et seq.*

On September 24, 1984, Petitioner filed a complaint in the United States District Court for the District of New Jersey alleging breach of the collective bargaining agreement by Respondent Conrail, and breach by Petitioner's union, Respondent Brotherhood of Maintenance of Way Employees, Local No. 2906, of its duty of fair representation in not processing his grievance against Conrail (Pa3). Respondent New Jersey Transit Corporation was joined in the complaint based on an allegation that it was the successor to Conrail. The complaint was not mailed to the various defendants until October 10 or 11, 1984, and receipt of the summons was acknowledged by the various defendants between October 12, 1984 and October 22, 1984. Petitioner conceded, and all parties agreed for purposes of the action below, that the latest date on which Petitioner learned of the alleged breach of the duty of fair representation was on March 25, 1984 (Pa3, 17).

All Respondents moved for summary judgment on the ground that plaintiff failed to comply with the applicable statute of limitations for a "hybrid" breach of contract/breach of duty of fair representation action contained in Section 10(b) of the National Labor Relations Act ("NLRA"), 29 *U.S.C.* § 160(b), which requires filing and service of the complaint within six months of accrual of

the cause of action.* Because Respondent New Jersey Transit Corporation is an instrumentality of the State of New Jersey, *N.J.S.A.* 27:25-4(a), New Jersey Transit also moved to dismiss the complaint on the grounds that the action against it was barred by the provisions of the Eleventh Amendment to the United States Constitution, and because as a matter of law and fact New Jersey Transit was not the successor to the collective bargaining agreement between Petitioner and Conrail.

The District Court granted Respondents' motion for summary judgment based on Petitioner's failure to serve defendants within six months as required by Section 10(b) of the NLRA (Pa14-17). As the complaint was dismissed against all of the Respondents on the basis that Petitioner did not comply with the applicable statute of limitations, the District Court did not rule on the additional grounds for dismissal raised by Respondent New Jersey Transit Corporation (Pa17).

The Court of Appeals for the Third Circuit affirmed, ruling that the limitations period applicable to a fair representation action as a result of this Court's decision in *DelCostello v. International Brotherhood of Teamsters, supra,* Section 10(b) of the NLRA, unambiguously requires both filing and service of process within six months

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* While labor relations between Petitioner, his union and employer are governed by the Railway Labor Act, 45 *U.S.C.* § 151, *et seq.*, not the National Labor Relations Act, the Third Circuit in *Sisco v. Conrail,* 732 *F.*2d 1188 (3rd Cir. 1984) ruled that the Section 10(b) limitation period adopted for breach of contract/breach of duty of fair representation actions by this Court in *DelCostello v. International Brotherhood of Teamsters,* 462 *U.S.* 51 (1983), also applies to fair representation claims arising under the Railway Labor Act.

of accrual of the claim (Pa.3, 6). *West v. Conrail,* 780 *F.*2d 361, 363 (3rd Cir. 1985). The Court below rejected Petitioner's argument that the service requirement of Section 10(b) should be ignored and instead be replaced by the service provisions of the Federal Rules of Civil Procedure, which Petitioner contended would toll the running of the applicable statute of limitations at the time of the filing of the complaint. The Third Circuit found that "grafting Fed. Rule Civ. Proc. 4(j) onto 10(b) . . . would increase the time limit for initiation of the dispute resolution process from six to ten months, a substantial addition," contrary to the Congressional policy of prompt resolution of labor disputes (Pa6).

Summary of Argument

The decision of the Third Circuit correctly applied the requirements of 29 *U.S.C.* § 160(b) that a complaint be both filed and served within six months in cases of this type. Where service is an integral part of a borrowed statute of limitations, the borrowing includes both the statute's filing and service requirements.

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REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT SPECIAL OR IMPORTANT REASONS WARRANTING REVIEW.

Rule 17 of this Court's Rules provides that a petition for a writ of certiorari will be granted only where there are special and important reasons. In the instant matter, no such reasons exist.

Petitioner argues that the Writ should be granted because of a confict between the decision below, and decisions of the Sixth Circuit in *Macon v. ITT Continental Baking Co.,* 779 *F.*2d 1166 (6th Cir. 1985), *cert. pending,* No. 85-1400, and the District Court for the Southern District of Iowa, *Thomsen v. United Parcel Service, Inc.,* 608 *F.Supp.* 1244 (S.D. Ia. 1985). However, a conflict between Circuit Courts of Appeal does not automatically entitle a Petitioner to a grant of certiorari. 13 *Moore's Federal Practice,* § 817.21 (2d ed. 1985). *Macon v. ITT Continental Baking Co., supra,* is the only Circuit Court decision in conflict with the ruling below that in a hybrid breach of contract/breach of duty of fair representation action, suit is timely only when a plaintiff both files and serves a complaint within the six month limitation period. In contrast, the decision below is in accord with the Ninth Circuit Court of Appeals, *Gallon v. Levin Metals Corp.,* 779 *F.*2d 1439 (9th Cir. 1986), and with the Eleventh Circuit, *Simon v. Kroger Co.,* 743 *F.*2d 1544 (11th Cir. 1984), *cert. den.* 105 *S.Ct.* 2155 (1985); *Williams v. Greyhound Lines, Inc.,* 756 *F.*2d 818 (11th Cir. 1985); *Dunlap v. Lockheed-Georgia Co.,* 755 *F.*2d 1543 (11th Cir. 1985); *Howard v. Lockheed-Georgia Co.,* 742 *F.*2d 612 (11th Cir. 1984).

While Petitioner notes a conflict between *Thomsen v. United Parcel Service, Inc., supra,* and the decision below, a conflict between a decision of a District Court and that of a Circuit Court of Appeals is generally not sufficient for purposes of the prerequisites to the granting of certiorari set forth in Rule 17. 13 *Moore's Federal Practice, supra.* Moreover, at least four District Courts have ruled in accordance with the Third Circuit's decision below. *Ellenbogen v. Rider Maintenance Corp.,* 621

F.Supp. 324 (S.D.N.Y. 1985); *Waldron v. Motor Coils Manufacturer Co.*, 606 *F.Supp.* 658 (W.D.Pa. 1985); *Thompson v. Ralston Purina Co.*, 599 *F.Supp.* 756 (W.D. Mich. 1984); *Hoffman v. United Market, Inc.*, 117 *L.R.R.M.* 3229 (N.D. Cal. 1984).

The situation presented by Petitioner, involving a complaint filed but not served within six months as required by Section 10(b), is neither of special significance nor likely to recur frequently. This Court has stated that the legal issue in question in a petition for a writ of certiorari must be "beyond the academic or episodic." *Rice v. Sioux City Cemetery*, 349 *U.S.* 70, 74 (1955). Respondent New Jersey Transit respectfully submits that the Petition in this case does not present "special and important" reasons warranting review.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT ON THE BASIS THAT PETITIONER FAILED TO SATISFY THE SERVICE REQUIREMENTS OF THE APPLICABLE STATUTE OF LIMITATIONS.

In *DelCostello v. International Brotherhood of Teamsters, supra,* this Court ruled that the applicable limitation period for purposes of a hybrid breach of contract/breach of duty of fair representation action against an employer and a union is governed by Section 10(b) of the National Relations Labor Act, 29 *U.S.C.* § 160(b). The plain language of Section 10(b) requires both filing *and* service of a charge within six months. *NLRB v. Local 264, Laborer's International Union*, 529 *F.*2d 778, 782 (8th Cir. 1982).

There is no reason why the six month limitation period would be borrowed without also borrowing the statute's service requirement. *Howard v. Lockheed-Georgia Co., supra,* 742 *F.*2d at 614.

Indeed, as noted by the Court below, failure to apply both the filing and service requirements of Section 10(b) in actions of this type would be inconsistent with the purposes for adoption of this limitation statute. In *DelCostello,* this Court found that the Congressional goal in enacting Section 10(b) was to balance the national interest in speedy resolution of employment disputes through the collective bargaining process with the right of employees to challenge what they viewed as unjust settlements, the same balance of interests at issue in a breach of contract/duty of fair representation action. *DelCostello v. International Brotherhood of Teamsters, supra,* 462 *U.S.* at 170-171. Thus, this Court rejected adoption of a three-year, state limitation period for legal malpractice, because borrowing such a statute of limitations "would preclude the relatively rapid final resolution of labor disputes favored by federal law." *Id.*, 462 *U.S.* at 168. As found by the Court below, substitution of the Section 10(b) requirement of filing and service within six months of accrual with *F.R.C.P.* 4(j) could extend the relatively short six month statute of limitations to ten months, "a substantial addition" for resolution of fair representation actions, contrary to one of the purposes for borrowing the Section 10(b) limitations period (Pa 6).

Petitioner, both in his Question Presented for Review and in the body of the Petition, characterizes the Third Circuit's application of both the filing and service require-

ments of Section 10(b) as "creating an exception to the general rule that in federal question cases the filing of a complaint, not completion of service, satisfies the statute of limitations." This central contention of Petitioner is plainly incorrect for a variety of reasons.

First, as conceded by Petitioner (P6), it is by no means settled that in federal question cases, the mere filing of a complaint in federal court tolls the applicable statute of limitations. As noted by this Court:

> "Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." 4 C. Wright and A. Miller, *Federal Practice Procedure* § 1057, p. 191 (1969) (footnote omitted). . . .

Walker v. Armco Steel Corp., 446 *U.S.* 740, 751, n. 10 (1980). Petitioner can hardly claim that the Court below has created an "exception" to a purported "general rule," when this Court has expressly left open the question of whether the mere filing of a complaint based on a federal cause of action tolls the applicable limitation period.

More significantly, Petitioner's contention that "outside of the fair representation area," Rule 3 of the Federal Rules determines when a statute of limitations is tolled for a federal claim is plainly in error. In *Board of Regents v. Tomanio,* 446 *U.S.* 468 (1980), a case based on a federal statute, 42 *U.S.C.* § 1983, this Court reaffirmed the long practice not only of borrowing the most analogous state limitation period where the applicable federal statute contains no particular limitation provision

to govern actions under the right, but also borrowing the tolling provisions contained in the state law. *See also, Johnson v. Railway Express Agency,* 421 *U.S.* 454, 463-465 (1975) (adopting tolling provisions of state law in an action based on 42 *U.S.C.* § 1981).

While the instant case involves adoption of a limitation period established by federal, not state law, there is similarly no basis for ignoring the tolling provisions of the borrowed statute. Where a federal statute imposes additional requirements in order to commence an action, the filing of a complaint without satisfying those additional prerequisites cannot toll the limitation period. *United States v. Matles,* 356 *U.S.* 256 (1958) (where an affidavit of good cause was a statutory prerequisite to initiating an action under a federal immigration statute, the timely filing of a complaint without such an affidavit did not toll the limitations period, and the failure to file a timely affidavit could not be cured by amendment). Thus, Petitioner's contention that the decision below is "a departure from procedures applicable to other federal question cases" is wholly without merit.

Finally, without any reference to the record, Petitioner speculates that it would be difficult for "an unsophisticated worker" to comply with the service requirements of Section 10(b) because unions might be tempted to avoid service of process (P7). The lack of merit in this conjecture is underscored by the fact that Congress has expressly required employees who are the victims of *any* union unfair labor practice, as set forth in 29 *U.S.C.* § 158(b), to both file and serve the charge within six

months. 29 *U.S.C.* § 160(b)*. Moreover, the absurdity of Petitioner's policy argument concerning the difficulty of service is demonstrated by Rule 4(c)(2)(C) of the Federal Rules of Civil Procedure, which permits service by mailing a summons and complaint, as occurred in the instant matter without any apparent difficulty (Pa 17), and by Federal Rule 4(c)(2)(D), which provides for penalties for failure to complete and return a mailed acknowledgement of service. Indeed, the six month limitation period adopted by this Court is longer than the limitation period in state arbitration statutes which had been applied by some courts to fair representation actions before the *DelCostello* decision, and provides sufficient time for even those employees "unsophisticated in collective bargaining matters" to bring a claim. *DelCostello v. International Brotherhood of Teamsters, supra,* 462 *U.S.* at 166.

For the foregoing reasons, the decision below is a logical extension of this Court's decision in *DelCostello,* and is consistent with holdings in other cases involving borrowed statutes of limitation which impose additional requirements beyond the mere filing of a complaint in order to commence an action.

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* As noted by this Court, the National Labor Relations Board has consistently held that a breach of a union's duty of fair representation is also an unfair labor practice. *DelCostello v. International Brotherhood of Teamsters, supra,* 462 *U.S.* at 170.

CONCLUSION

For the foregoing reasons, Respondent New Jersey Transit Corporation respectfully submits that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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